IN THE SUPREME COURT OF MISSISSIPPI

NO. 2015-FC-01317-SCT

ROBERT SWINDOL **APPELLANT**

v.

AURORA FLIGHT SCIENCES CORPORATION **APPELLEE**

Certification by the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE LETTER OF SUPPLEMENTAL AUTHORITIES AS AMICUS CURIAE

COMES NOW, Leaf River Cellulose, L.L.C., by and through undersigned counsel, and files this Motion for Leave to File Letter of Supplemental Authorities as *Amicus Curiae*.

1. On August 28, 2015, the United States Court of Appeals for the Fifth Circuit certified the question "[w]hether in Mississippi an employer may be liable for a wrongful discharge of an employee for storing a firearm in a locked vehicle on company property in a manner that is consistent with [Miss. Code Ann.] Section 45-9-55." *See Swindol v. Aurora Flight Sciences Corp.*, No. 14-60779 Slip. Op. at 9 (5th Circuit August 28, 2015).

2. Leaf River, as defendant in *Parker v. Leaf River Cellulose, L.L.C.*, No. 15-60034 in the United States Court of Appeals for the Fifth Circuit, has a direct, concrete, and important interest in the outcome of the certified question.

3. Contemporaneously with this Motion, and consistent with Mississippi Rule of Appellate Procedure 29(b), Leaf River respectfully submits "a brief stating why the motion satisfies the requirements of Rule 29(a)," its Letter of Supplemental Authorities, and the following Exhibits:

Exhibit 1: Proposed Amicus Brief in Support of Appellee

Exhibit A: Slip Opinion, *Parker v. Leaf River Cellulose, L.L.C.*, No. 15-60034 (*held in abeyance*).

Exhibit B: Brief of Appellee, *Parker v. Leaf River Cellulose, L.L.C.*, No. 15-60034.

THIS, the 5th day of October, 2015.

Respectfully submitted,

BY: */s/ W. Thomas Siler, Jr.*

W. THOMAS SILER, JR., MB #6791
GREGORY TODD BUTLER, MB #102907
A. MARTIN EDWARDS, IV MB #104677
PHELPS DUNBAR LLP
4270 I-55 NORTH
JACKSON, MISSISSIPPI 39211-6391
POST OFFICE BOX 16114
JACKSON, MISSISSIPPI 39236-6114
Telephone: 601-352-2300
Telecopier: 601-360-9777
Email: silert@phelps.com
butlert@phelps.com

ATTORNEYS FOR LEAF RIVER CELLULOSE, LLC

CERTIFICATE OF SERVICE

The undersigned attorney of record for Leaf River Cellulose, L.L.C., does hereby certify that I have this day served the foregoing *MOTION* upon the following parties via the Mississippi Supreme Court's CM/ECF system or U.S. Mail, postage prepaid, at the addresses listed below:

M. Reed Martz
Freeland Martz, PLLC
P.O. Box 2249
Oxford, MS 38655
reed@freelandmartz.com

ATTORNEY FOR JOSEPH EDWARD PARKER

David O. Butts
David Butts Law Firm
398 East Main St., Suite 110
Tupelo, MS 38804

ATTORNEY FOR ROBERT SWINDOL

Stephen W. Robinson
Nicholas D. SanFilippo
McGuireWoods LLP
1750 Tysons Boulevard
Suite 1800
Tysons Corner, VA 22102-4215
srobinson@mcguirewoods.com
nsanfilippo@mcguirewoods.com

R. Bradley Best
Holcomb, Dunbar, Watts, Best, Masters, & Golmon, P.A.
400 South Lamar Blvd., Suite A
P.O. Drawer 707
Oxford, MS 38655
bradbest@holcombdunbar.com

ATTORNEYS FOR AURORA FLIGHT SCIENCES CORPORATION

Michael B. Wallace
Rebecca Hawkins
Wise Carter Child & Carraway, P.A.
P.O. Box 651

Jackson, MS 39205
601.968.5500
mbw@wisecarter.com
rwh@wisecarter.com

Charles J. Cooper
David H. Thompson
Cooper & Kirk, PLLC
1523 New Hampshire Ave., NW
Washington, D.C. 20036
202.220.9600

ATTORNEYS FOR NATIONAL RIFLE ASSOCIATION, INC

This the 5th day of October, 2015.

/s/ W. Thomas Siler, Jr.
W. THOMAS SILER, JR.

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2015-FC-01317-SCT

ROBERT SWINDOL **APPELLANT**

v.

AURORA FLIGHT SCIENCES CORPORATION **APPELLEE**

Certification by the United States Court of Appeals for the Fifth Circuit

PROPOSED BRIEF OF AMICUS CURIAE LEAF RIVER CELLULOSE, L.L.C. IN SUPPORT OF APPELLEE

W. Thomas Siler, Jr., Miss. Bar No. 6791
G. Todd Butler, Miss. Bar No. 102907
A. Martin Edwards, IV, Miss. Bar No. 104677
PHELPS DUNBAR, LLP
4770 I-55 NORTH
JACKSON, MISSISSIPPI 39211
TEL: 601-352-2300
FAX: 601-360-9777
EMAIL: silert@phelps.com
butlert@phelps.com
martin.edwards@phelps.com

Attorneys for Leaf River Cellulose, L.L.C.

Appellant Robert Swindol and the National Rifle Association aim to convince this Court that this case is about gun rights and the Second Amendment. Do not be fooled. This case is about Mississippi's longstanding recognition of the at-will employment doctrine and who gets to decide whether Mississippi employers may be subject to new theories of civil liability. Principles of separation of powers demand that such authority remain vested in the Legislature of the State of Mississippi.

To be clear, at issue in this case is whether this Court wants to create new law. The Fifth Circuit in *Parker v. Leaf River Cellulose, L.L.C.*, No. 15-60034, Slip Op. (5th Cir. July 27, 2015) (*held in abeyance*) (attached hereto as Exh. A) has already determined that existing law forbids Appellant's claim. For all the reasons that follow, creating new law on the facts of this case would frustrate not only this Court's longstanding adherence to the employment at-will doctrine, but also bedrock principles of separation-of-powers between the legislature and judiciary.

INTEREST OF AMICUS CURIAE

Leaf River Cellulose, L.L.C., is the Appellee in *Parker v. Leaf River Cellulose, L.L.C.*, No. 15-60034, a case pending in the United States Court of Appeals for the Fifth Circuit. Joseph Parker, the Appellant in *Leaf River*, alleges he was employed by Leaf River but was terminated because, contrary to Leaf River policy, Parker parked his vehicle in Leaf River's parking lot with a firearm locked inside. As noted by the Fifth Circuit in its Certificate to this Court, *Leaf River* involves the same statute and implicates substantially similar issues as those involved in the question certified to this Court. While the Fifth Circuit issued an opinion deciding Leaf River's case in its favor, it held the mandate in abeyance pending the outcome of this certification. Consequently, Leaf River has a direct, concrete, and important interest in the resolution of this case.

In addition, the National Rifle Association ("NRA") filed a brief as *amicus curiae* in support of the Appellant, which evinces a clear effort to transform this case from an employment dispute to a political proxy war not suited for resolution by the courts. Though the Second Amendment undoubtedly is an inextricable thread in the American tapestry of liberty, this case is not about the right to keep and bear arms. This case is about equally fundamental principles pertaining to the role and function of the judiciary, as embodied by years of longstanding and

well-reasoned precedent authored by this Court. Leaf River therefore wishes to bring to the Court's attention the NRA's misunderstanding of Mississippi's longstanding commitment to the employment at-will doctrine and the NRA's misinterpretation of Mississippi Code § 45-9-55.

ARGUMENT AND AUTHORITIES

This argument proceeds in three parts: First, Leaf River proposes this Court should exercise its discretion to decline to answer the certified question. Second, the Fifth Circuit has correctly and wisely refused to interpret Mississippi Code § 45-9-55 to contain an implicit right to a civil action for money damages. Third, this Court, should it decide to answer the certified question, should determine that Mississippi Code § 45-9-55 is not a proper basis for expanding the greatly circumscribed civil action of wrongful discharge.

1. This Court has Discretion to Decline the Certified Question

Mississippi Rule of Appellate Procedure 20(a) provides in pertinent part: "The Supreme Court may, in its discretion, decline to answer the questions certified to it." This Court in the past has declined certification for several reasons, among them that the question certified already is well-settled. *See Cowan v. Ford Motor Co.*, 437 So. 2d 46, 47 (Miss. 1983) (declining to rule on the certified question because this Court already had interpreted the statute and "the case . . . [did] not involve any matter of great public interest presenting any unique or unusual legal problem not already decided by this Court"). Though Mississippi Code § 45-9-55 has not been interpreted by this Court, Mississippi's employment at-will and wrongful discharge doctrines are well-established. *See McArn v. Allied Bruce-Terminix Co., Inc.*, 626 So. 2d 603, 607 (Miss. 1993).

This steadfast adherence to the employment at-will doctrine is evident even where some legislative enactment suggests the Legislature may have desired or intended to abrogate it. *See Kelly v. Miss. Valley Gas Co.*, 397 So. 2d 874, 876 (Miss. 1981). There, an employee terminated

after filing for worker's compensation benefits asked this Court to create a claim of wrongful discharge on a theory sounding in worker's compensation retaliation. *Id.* This Court declined on the principle that exceptions to the employment-at-will doctrine should not be found by reading between the lines of legislative enactments. *Id.* ("Remedies for claims resulting from alleged violation of the spirit of the workmen's compensation act are best left to the legislature."). Indeed, this Court consistently and repeatedly has demanded nothing less than a clear and explicit statement of legislative intent to further abrogate the employment at-will doctrine. The U.S. District Court for the Northern District of Mississippi recognized this in its opinion, citing reams of authority demonstrating this Court's steadfast refusal. *See Swindol v. Aurora Flight Sci. Corp.*, 2014 WL 4914089 at *3 (collecting cases); *see also* Leaf River's Appellate Brief in the Fifth Circuit, Exh. B at 14-18.

The Mississippi Legislature does not enact its statutes without knowledge of the fundamental interpretive methods and doctrines adhered to by this Court. This Court issued its opinion in *Kelly*, along with its strong language against divining an additional remedy from "the spirit" of the statute, in 1981. *See Kelly*, 397 So. 2d at 876. The Legislature, then, must be considered aware that this Court will apply nothing more or less than the plain language enacted and certainly will not abrogate the employment at-will doctrine in its silence. Indeed, it would be "not only appropriate but also realistic to presume that [the Legislature] was thoroughly familiar" with the holding in *Kelly* – an "unusually important precedent" from this Court in this area of law. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 699 (1979). If this Court ignored some then-existing-but-unstated desire of the Legislature to create an additional exception to the employment at-will doctrine, the Legislature could have remedied the purported error by adding

such a provision. It has not done so. Mississippi's employment at-will doctrine undoubtedly is revered not only by this Court but by the Legislature here alleged to have abrogated it implicitly.

The Legislature, aware as it should be of this Court's longstanding rule of interpretation in wrongful discharge cases, would have included an explicit direction that the wrongful discharge doctrine be enlarged if such was its desire or purpose. *See Anderson, ex rel. Doss v. Jackson Mun. Airport Auth.*, 419 So. 2d 1010, 1013 (Miss. 1982) (concluding legislative enactment following a holding of this Court should be interpreted consistent with prior holding absent explicit contrary language in the enactment). It is more likely that the Legislature agrees with those principles and legislates with the understanding this Court *will not* expand its intent beyond the plain text of its enactments.

The NRA admits the Legislature did not in Section 45-9-55 provide *any* specific remedy for an alleged violation. *See* NRA Br. at 5. Even so, it casually ignores that legislative judgment, first by declaring the legislature's intent obvious and later by arguing a right without a remedy is no right at all. *See* NRA Br. at 4, 5. Neither contention has merit. Miss. Code § 45-9-55(1) states: "a public or private employer may not establish, maintain, or enforce any policy or rule that has the effect of prohibiting a person from transporting or storing a firearm in a locked vehicle in any parking lot, parking garage, or other designated parking area." Miss. Code § 45-9-55(1). Contrary to the NRA's brisk reasoning and even assuming Aurora or Leaf River actually violated Section 45-9-55(1), this does not mean either are subject to a wrongful discharge action for money damages by an employee terminated pursuant to an allegedly illegal policy. If the Legislature intended such a result, it would have, consistent with this Court's longstanding principles of interpretation, stated the same in unmistakably clear language – and in any event

not abject silence. The Court may decline to answer the certified question because its longstanding and well-reasoned precedent has answered it many times over.

2. *The Fifth Circuit did not Certify the Question of Whether an Enforcement Term should be Crafted for Violations of Mississippi Code § 45-9-55(1)*

The NRA posits the plain text of Section 45-9-55(1) abrogates the employment at-will doctrine *explicitly* and therefore, *a fortiori*, includes a civil action for money damages *implicitly*. This proposition is erroneous. In any case, the Fifth Circuit asks this Court only "[w]hether in Mississippi an employer may be liable for a wrongful discharge of an employee for storing a firearm in a locked vehicle on company property in a manner that is consistent with Section 45-9-55." *Swindol v. Aurora Flight Sci. Corp.*, No. 14-60779 Slip Op. at 9 (5th Cir. August 28, 2015). Notably, the Fifth Circuit certified this question, while in *Leaf River* it answered in the negative a similar question as a matter of statutory interpretation. *See* No. 15-60034, Slip Op. 3-5 attached as Exh. A.

In *Leaf River*, the Fifth Circuit panel – which included Judge Leslie Southwick, formerly of the Mississippi Court of Appeals – began its opinion by laying bare the only possible interpretive matter in either case when it stated: "[W]e are called upon to remedy the Mississippi legislature's alleged drafting oversight." *Id.* at 1. The essence of Swindol's argument, Parker's argument, and the NRA's argument as *amicus* is that the only possible explanation for the lack of a remedy provision in Section 45-9-55 is because the Legislature forgot to provide explicitly for a civil action for money damages. In rejecting this argument when made by Parker, the Fifth Circuit reasoned that Section 45-9-55(5) – which grants immunity to employers from any "civil action for damages resulting from or arising out of an occurrence involving the transportation, storage, possession or use of a firearm," – includes civil actions for money damages on theories of wrongful discharge. *Id.* at 3; *see also* Miss. Code § 45-9-55(5). The Fifth Circuit correctly

and emphatically determined that if the Legislature had intended for this Court to infer a civil action for money damages from Section 45-9-55(1), it certainly would not have explicitly immunized employers from those types of lawsuits in Section 45-9-55(5). For that reason, it did not certify a question asking this Court, as the Fifth Circuit was asked in *Leaf River*, to insert a judicially-crafted enforcement term into Section 45-9-55(1). *See* No. 15-60034 at 1 ("[w]e are called upon to remedy the Mississippi legislature's alleged drafting oversight. We decline the invitation and instead apply the statute as written"). The Fifth Circuit reached this conclusion relying on sound principles of statutory interpretation utilized by this Court. *See id.* at 2-3.

Simply put, the Fifth Circuit did not ask a question of statutory interpretation when it certified the question to this Court because it already found the answer to be clear in *Leaf River*. *See* No. 15-60034 at 2-5. It asked only whether this Court might expand the greatly circumscribed action for wrongful discharge under the circumstances in this case. *Swindol*, No. 14-60779 at 9. Because the Fifth Circuit has already addressed the issue of statutory interpretation related to Section 45-9-55, the sole issue presented to the Court by the Fifth Circuit is whether this Court will recognize a new and distinct claim for wrongful discharge by an at-will employee whose employment is terminated because the employee engaged in conduct alleged to have been protected by Section 45-9-55(1). As detailed in the following section, the answer is that it should not.

3. Overwhelming Authority Supports Answering the Certified Question in the Negative

A panel of the Fifth Circuit properly and wisely rejected the contention (now advanced by the NRA) that Section 45-9-55 included an unwritten enforcement term. Even so, the NRA now claims that even if the Legislature did not abrogate explicitly the at-will employment rule, this Court should nevertheless extend the public policy exception adopted in *McArn* to allow a

wrongful discharge claim by an employee whose employment is terminated based on conduct the employee contends is protected by Section 45-9-55(1). NRA Br. at 5. Neither the facts underlying the certified question nor the provisions of Section 45-9-55 support a *McArn* claim. In addition, the NRA's half-hearted effort to transform Section 45-9-55 into a criminal statute should be rejected not only because it is wrong, but because it would bring with it significant unintended consequences. *See* NRA Br. at 3-4. Finally, as the Fifth Circuit noted in declining to read an enforcement term into Section 45-9-55, Section 45-9-55(5) provides immunity from civil actions for money damages – including such actions for wrongful discharge pursuant to *McArn*.

a. Section 45-9-55(1) Does Not Support a McArn *Claim*

McArn involved an at-will employee's claim for wrongful discharge predicated on allegations that he was fired after reporting deceptive and criminally illegal practices of his employer. 626 So. 2d at 606. The employee claimed that the conduct which he reported violated Mississippi Code § 97-19-39, which made it a felony to receive $500.00 or more from another based on false pretenses, and § 69-23-19, which provided that violations of certain state regulations pertaining to pest control constituted a misdemeanor. *Id.* In allowing the employee to advance a wrongful termination claim against his former employer, this Court found that

> there should be in at least two circumstances, a narrow public policy exception to the employment at will doctrine and this should be so whether there is a written contract or not: (1) an employee who refuses to participate in an illegal act . . . shall not be barred by the common law rule of employment at will from bringing an action in tort for damages against his employer; (2) an employee who is discharged for reporting illegal acts of his employer to the employer or anyone else is not barred by the employment at will doctrine from bringing action in tort for damages against his employer.

Id. at 607.

The NRA begins with the creative claim that an alleged violation of Section 45-9-55 "likely is a *criminal offense*." NRA Br. at 3 (emphasis original). Practically a *non-sequitur*

given the procedural posture of the instant matter, this position is premised upon Mississippi Code § 99-19-31. Section 99-19-31 provides in pertinent part: "[O]ffenses for which a penalty is not provided elsewhere by statute . . . shall be punished by fine of not more than one thousand dollars ($1,000) and imprisonment in the county jail of not more than six (6) months, or either." Miss. Code § 99-19-31. Though the NRA leaves this argument orphaned in the early stages of its brief and does not reference it again, its presence likely is an effort to wedge this case into the already-existing *McArn* framework. *See, e.g. Hammons v. Fleetwood Homes of Miss., Inc.*, 907 So. 2d 357, 360 (Miss. Ct. App. 2004) (requiring "acts complained of warrant the imposition of *criminal* penalties, as opposed to mere *civil* penalties" (emphasis added)); *see also Wheeler v. BL Dev. Corp.*, 415 F.3d 399, 404 (5th Cir. 2005) (finding that because the conduct at issue "did not constitute any form of criminally illegal activity[,] . . . *McArn's* 'narrow public policy exception' [was] not applicable"). Given that neither Swindol nor Parker alleges their terminations were due to assisting in the enforcement of or otherwise *reporting* or *complaining* of their employers' allegedly illegal policies, nor have they presented any evidence of the same, the NRA's inclusion of this line of reasoning yet further demonstrates their unfamiliarity with the employment at-will doctrine in Mississippi.

Moreover, to accept the NRA's theory that Section 45-9-55 is actually a criminal statute would be remarkable in light of the plain text of Section 99-19-31. In the first instance, Section 99-19-31 begins with the word "offense." According to Black's Law Dictionary "offense" refers to a "violation of the law; a crime, often a minor one . . . [a]lso termed *criminal offense.*" *Black's Law Dictionary* (10th ed. 2014), *available at* Westlaw BLACKS. "[A]n 'offense' is a breach of the laws established for the protection of the public, as distinguished from an infringement of mere private rights." 22 C.J.S. Criminal Law § 3. The NRA cites *Whirlpool*

Corp. v. Henry for the proposition that any statute without an explicit penalty provision is a crime. *See* 110 P.3d 83, 85 (Okl. Ct. Crim. App. 2005). Nonetheless, the Oklahoma "catchall" criminal statute provides in pertinent part: "Where the performance of an act is prohibited by any statute, and no penalty for the violation of such statute is imposed in any statute, the doing of such act is a misdemeanor." 21 Okl. St. Ann. § 21. Clearly, the two statutes are not comparable. Section 99-19-31 refers to "offenses," while the Oklahoma statute refers to "act[s]." *Cf.*Miss. Code § 99-19-31; 21 Okl. St. Ann. § 21. Furthermore, the text of Section 99-19-31 makes clear its purpose is to supply a *penalty* for statutory violations which already are *offenses*, but for whatever reason did not include penalties. The NRA's reading suggests Section 99-19-31 is designed to make the violation of any statutory prohibition of any kind an *offense*. This likely would come as quite a surprise to judges and attorneys in Mississippi, not to mention business owners and other individuals.

In abandoning this argument the NRA likely recognizes, as it must, that the public policy exception adopted in *McArn* is limited to the two circumstances identified by the *McArn* Court and that the facts presently before the Court do not fit precisely unless Section 45-9-55 is a criminal offense. NRA Br. at 5. Instead, the NRA asks this Court to find that the public policy exception adopted in *McArn* applies in a new and distinctly different circumstance. *Id.* Namely, the NRA seeks extension of the public policy exception to allow an at-will employee to assert a wrongful termination claim where the employee is terminated for engaging in conduct which the employee contends is protected by Section 45-9-55(1). *Id.*

The NRA relies upon authority from other jurisdictions for the proposition that Section 45-9-55 contains an invitation to this Court to expand the wrongful discharge doctrine even if it is not a criminal statute. Alas, the NRA's reliance on authority from other jurisdictions is

similarly unavailing because those cases involved statutes fundamentally different than Section 45-9-55. In *Moniodis v. Cook*, an intermediate appellate court in Maryland permitted at-will employees to assert a wrongful discharge claim after they were subjected to polygraph tests in contravention of a Maryland statute prohibiting the tests, imposing criminal penalties on employers who required such tests for job applicants, and which provided for civil enforcement by the state's attorney general of "all civil cases" arising under it. *See* 494 A.2d 212, 217-18 (Md. Ct. Spec. App. 1985), *superseded by statute as stated in Weathersby v. Ky. Fried Chicken Nat'l Mgmt. Co.*, 587 A.2d 569, 572-75 (Md. Ct. Spec. App. 1991). Unlike the Maryland statute, Section 45-9-55 does not include criminal penalties and does not contain an enforcement provision empowering the Attorney General in a manner that appears to exclude any other form of civil relief.[1] *Mitchell v. University of Kentucky* also is distinguishable in that the relevant Kentucky statute specifically permitted "an action for appropriate relief or for damages." *See* 366 S.W.3d 895, 898-902 (Ky. 2012) (citing K.R.S. 527.020(8)). Consequently, Kentucky law expressly permitted a wrongful discharge claim in *Mitchell* because "'the reason for the discharge was the employee's exercise of a right conferred by well-established legislative enactment[,]'" multiple statutes permitted the employee to possess a firearm, and the statutes specifically provided the aggrieved employee a civil cause of action for damages. *Id.* (citation omitted). As the Fifth Circuit previously has determined and as is clear from the plain language of the statute, Section 45-9-55 does not provide a civil cause of action for damages and in fact provides immunity from them. *See Leaf River*, No. 15-60034 Slip Op. at 3-5. Consequently, the NRA has not demonstrated that an alleged violation of Section 45-9-55(1) can serve as grounds

[1] The Maryland court ultimately concluded the "exclusive" enforcement action by the Maryland attorney general was *not* actually exclusive.

for a cognizable *McArn* claim, and this Court should thus decline the NRA's request to expand the public policy exception to the at-will employment doctrine.

b. Defining Section 45-9-55 as a Criminal Statute Would Create Significant Unintended Consequences

The NRA's suggestion that Section 45-9-55 is a criminal statute is not only incorrect, but also would bring with it substantial unintended consequences. Despite its professed interest in firearms regulation across the county, the NRA's unexamined position would wreak substantial unintended consequences on the overwhelming majority of Mississippi law not involving gun politics. As noted above, the *McArn* claim for wrongful discharge involves *criminally illegal* conduct. *See McArn*, 626 So. 2d at 606 (involving two criminal statutes); *see also Hammons*, 907 So. 2d at 360 ("the acts complained of [must] warrant the imposition of criminal penalties"). Even outside the employment context, there exist administrative and regulatory statutes which prohibit conduct but are not necessarily "offenses" for the purposes of Section 99-19-31. Consequently, the *McArn* doctrine would grow from a "narrow public policy exception" to one possibly including all manner of non-criminal but prohibited conduct. It would in addition set the perverse precedent that any statute with no penalty provision would be a criminal offense punishable by the penalties in Section 99-19-31, whereas other similar regulatory statutes that have non-criminal penalties would *not* be considered criminal.

An example may be helpful here. Miss. Code § 37-9-75 prohibits public school teachers from striking. The only penalties provided against the striking teacher are an injunction prohibiting the strike, as well as termination of the teacher. Neither of these are traditional criminal "penalties" – fine or imprisonment – nor is the strike termed an offense. *See* Miss. Code § 37-9-75. While arguably termination of public employment may be penal, the statute prohibiting striking is a civil, administrative, or regulatory violation, not a criminal one. This

Court should not indulge the NRA's efforts to transform Section 45-9-55 into a criminal statute, even if doing so may ease its ability to assert the existence of a *McArn* claim.

c. A McArn Claim for Wrongful Discharge would Conflict with the Plain Language of the Statute.

While finding in the silence of Section 45-9-55(1) an unwritten preference for an expansion of the wrongful discharge doctrine would contravene longstanding precedent, finding one in spite of Section 45-9-55(5)'s immunity provision would be remarkable. That provision provides a "private employer shall not be liable in a civil action for damages resulting from or arising out of an occurrence involving the transportation, storage, possession or use of a firearm covered by this section." The NRA posits that this immunity provision is limited – that is, it applies to some nonspecific set of instances that neither it nor the Legislature has defined. NRA Br. at 7-8.

Leaf River does not dispute the NRA's contention that the immunity provision can be explained in part by a legislative intent that employers not be held liable for acts of violence or unfortunate accidents that might arise from an employee's having a firearm in her automobile. *See* NRA Br. at 8. In fact, it should surprise no one that employers craft such policies specifically to avoid liability and that the Legislature likely was mindful of this as it developed this particular legislation. Nonetheless, it does not follow that immunity from "civil actions for damages" ends with "shield[ing] an employer from any liability that could arise from obeying the Legislature's command." NRA Br. at 8 (emphasis omitted). In addition, despite the NRA's insistence, firing an employee is an "occurrence" under any reasonable definition of the word, and no one here or in the Fifth Circuit has proposed the terminations in these two cases did not arise out of the "transportation, storage, possession, or use of a firearm." Miss. Code § 45-9-55(5). Contrary to the NRA's exhortation, the Legislature chose to include a grant of immunity

from civil actions for money damages, an immunity not qualified by the exclusion of wrongful discharge lawsuits. The Legislative choice to grant immunity in Section 45-9-55(5) weighs heavily against any inclination this Court may have to expand the doctrine of wrongful discharge on the basis of Section 45-9-55(1).

This Court reaffirmed just this year that its "function is not to decide what a statute should provide, but to determine what it does provide." *DeSoto Cnty. v. T.D.*, 160 So. 3d 1154, 1156 (Miss. 2015) (internal quotation marks and citation omitted). Here, to create a claim for wrongful discharge from Section 45-9-55(1) "would thereby engraft on the law an exception different from that expressed by the Legislature. This is not the function of the judicial department." *Kelly*, 397 So. 2d at 876. Section 45-9-55(5) provides immunity from civil actions for damages such as wrongful discharge claims, which themselves are permitted only under the already limited circumstances enunciated in *McArn*. *See* 626 So. 2d at 607. At bottom, Appellant, Parker, and the NRA ask this Court to vindicate their belief that the statute *should* be read to expand Mississippi's wrongful discharge doctrine. The statute *does not* so provide, and in fact provides precisely the opposite. *See DeSoto Cnty.*, 160 So. 3d at 1156. Any other outcome would frustrate "[t]he principle of the constitutional limitation on the power of the judicial department" long adhered to by this Court. *See Kelly*, 397 So. 2d at 877 (citing *State v. Traylor*, 56 So. 521 (1911)). Should this Court determine a need to answer the certified question, these and all relevant authorities overwhelmingly support an answer in the negative.

CONCLUSION

The only principle protecting the Second Amendment and Section 45-9-55 alike is the judicial commitment, consistent with longstanding principles of separation-of-powers at both the state and federal level, to interpret legal texts according to the words actually used and not according to ill-defined theories of correctness. Therein lies the crux of this case: Statutes are to

be interpreted according to the meaning of the words used. A three-judge panel of the Fifth Circuit did exactly this in *Leaf River* and this Court has done so repeatedly for many years. This Court may decline the certified question, as it has answered it many times over. Or, the Court may answer the certified question in the negative, refusing to write into a statute what the Legislature did not.

Respectfully Submitted,

Leaf River Cellulose, LLC

/s/ W. Thomas Siler, Jr.
W. Thomas Siler, Jr., Miss. Bar No. 6791
G. Todd Butler, Miss. Bar No. 102907
A. Martin Edwards, IV, Miss. Bar No. 104677
PHELPS DUNBAR, LLP
4770 I-55 NORTH
JACKSON, MISSISSIPPI 39211
TEL: 601-352-2300
FAX: 601-360-9777
EMAIL: silert@phelps.com
butlert@phelps.com
martin.edwards@phelps.com

CERTIFICATE OF SERVICE

The undersigned attorney of record for Leaf River Cellulose, L.L.C., does hereby certify that I have this day served the foregoing *AMICUS BRIEF* upon the following parties via the Mississippi Supreme Court's CM/ECF system or U.S. Mail, postage prepaid, at the addresses listed below:

M. Reed Martz
Freeland Martz, PLLC
P.O. Box 2249
Oxford, MS 38655
reed@freelandmartz.com

ATTORNEY FOR JOSEPH EDWARD PARKER

David O. Butts
David Butts Law Firm
398 East Main St., Suite 110
Tupelo, MS 38804

ATTORNEY FOR ROBERT SWINDOL

Stephen W. Robinson
Nicholas D. SanFilippo
McGuireWoods LLP
1750 Tysons Boulevard
Suite 1800
Tysons Corner, VA 22102-4215
srobinson@mcguirewoods.com
nsanfilippo@mcguirewoods.com

R. Bradley Best
Holcomb, Dunbar, Watts, Best, Masters, & Golmon, P.A.
400 South Lamar Blvd., Suite A
P.O. Drawer 707
Oxford, MS 38655
bradbest@holcombdunbar.com

ATTORNEYS FOR AURORA FLIGHT SCIENCES CORPORATION

Michael B. Wallace
Rebecca Hawkins

Wise Carter Child & Carraway, P.A.
P.O. Box 651
Jackson, MS 39205
601.968.5500
mbw@wisecarter.com
rwh@wisecarter.com

Charles J. Cooper
David H. Thompson
Cooper & Kirk, PLLC
1523 New Hampshire Ave., NW
Washington, D.C. 20036
202.220.9600

ATTORNEYS FOR NATIONAL RIFLE ASSOCIATION, INC.

This the 5th day of October, 2015.

/s/ W. Thomas Siler, Jr.
W. THOMAS SILER, JR.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-60034
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
July 27, 2015
Lyle W. Cayce
Clerk

JOSEPH EDWARD PARKER,

Plaintiff - Appellant

v.

LEAF RIVER CELLULOSE, L.L.C.,

Defendant - Appellee

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 2:14-CV-9

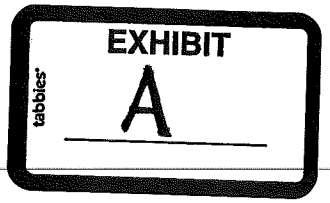
Before REAVLEY, DENNIS, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

In this case, we are called upon to remedy the Mississippi legislature's alleged drafting oversight. We decline the invitation and instead apply the statute as written.

Plaintiff–Appellant Joseph Edward Parker was an employee of Defendant–Appellee Leaf River Cellulose, LLC ("Leaf River") from 2008 until

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.



2013. On December 13, 2013, Leaf River terminated Parker's employment because, contrary to company policy, Parker parked his vehicle in the company parking lot with a firearm locked inside.

Under Mississippi law, with exceptions not pertinent here, a "private employer may not establish, maintain, or enforce any policy or rule that has the effect of prohibiting a person from transporting or storing a firearm in a locked vehicle in any parking lot, parking garage, or other designated parking area." Miss. Code. Ann. § 45-9-55(1).

Leaf River allegedly violated this law. Based on this alleged violation of the law, Parker brought this diversity action seeking damages in excess of $75,000.

The same statute Leaf River allegedly violated further provides that a "private employer shall not be liable in a civil action for damages resulting from or arising out of an occurrence involving the transportation, storage, possession or use of a firearm covered by this section." Miss. Code. Ann. § 45-9-55(5). Based on this provision, Leaf River filed a motion to dismiss, which the district court granted. The issue is whether a damages claim is available to Parker. Applying the law as written, we find no such remedy available.

"The district court's dismissal for failure to state a claim is reviewed de novo." *Gearlds v. Entergy Servs., Inc.*, 709 F.3d 448, 450 (5th Cir. 2013). We must determine whether the allegations, taken as true and viewed in the light most favorable to the plaintiff, "state a claim for relief that is plausible on its face." *Gines v. D.R. Horton, Inc.*, 699 F.3d 812, 816 (5th Cir. 2012) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 1974 (2007)).

This case presents a pure question of statutory interpretation. Because we are construing a Mississippi statute, we must adhere to the interpretive methods of Mississippi courts. *See Boatner v. Atlanta Speciality Ins. Co.*, 115 F.3d 1248, 1255 (5th Cir. 1997). Where statutory text is plain and

unambiguous, Mississippi courts disclaim any interpretive role. *See Pat Harrison Waterway Dist. v. Cnty. of Lamar*, No. 2013-CA-01535-SCT, 2015 WL 1249679, at *10 (Miss. Mar. 19, 2015) ("Before we engage in statutory interpretation, we look to the statute to determine whether interpretation is necessary, that is, whether the language is plain, unambiguous, and in need of no interpretation."); *Miss. Methodist Hosp. & Rehab. Ctr., Inc. v. Miss. Div. of Medicaid*, 21 So.3d 600, 607 (Miss. 2009) ("This Court will not engage in statutory interpretation if a statute is plain and unambiguous."). Further, the Mississippi Supreme Court has very recently reiterated that its "function is not to decide what a statute should provide, but to determine what it does provide," its "constitutional duty is to interpret statutes according to their clear meaning," and its obligation is to "apply the plain meaning of unambiguous statutes." *DeSoto Cnty. v. T.D.*, 160 So.3d 1154, 1156 (Miss. 2015) (internal quotations and citations omitted).

The Mississippi legislature has decided that employers "shall not be liable in a civil action for damages resulting from or arising out of an occurrence involving the transportation, storage, possession or use of a firearm covered by this section." Miss. Code. Ann. § 45-9-55(5). We find this provision plain, unambiguous, and applicable. This is a "civil action for damages" that, as alleged, results from and arises out of Parker's transportation and storage of a firearm as contemplated by section 45-9-55(1). Accordingly, Leaf River cannot be held liable for civil damages and the case must be dismissed.

Parker does not argue that this civil action for damages does not arise from his transportation and storage of a firearm. Rather, he argues that the statue does not mean quite what it says. We do not quibble with Parker's contention that section 45-9-55 must be read and interpreted as a whole. *See e.g., Lawson v. Honeywell Int'l, Inc.*, 75 So.3d 1024, 1029 (Miss. 2011) ("The Court looks to the whole of a statute to avoid adhering to one sentence or

phrase of statute in a way that skews its true meaning."). But, as is shown when his specific arguments are considered, this gets Parker nowhere.

Parker argues that the law's purpose would be confounded if damages claims were not permitted, that subsection (5)'s immunity only covers situations where "an employee illegally uses the firearm the employer was prevented from prohibiting," that subsections (1) and (5) are in conflict, and that we have "power to correct obvious errors." Each of these arguments fails.

Parker's purposivist approach to statutory interpretation is at odds with the strict textual approach applicable under Mississippi law when the text is unambiguous. Further, Parker goes beyond the text and cites legislative history in an effort to show that subsection (5) was intended to provide employers immunity only in the event of a shooting. Under Mississippi law, however, legislative history is a tool of "statutory construction" only employed after a finding that the text is ambiguous. *See, e.g.*, *Bell v. State*, 160 So.3d 188, 193 (Miss. 2015). That Parker's invocation of legislative intent is inconsistent with the statutory text is laid bare by Parker's stark plea: "Let Legislative Purpose Control Over Words." This we will not do. *See DeSoto Cnty.*, 160 So.3d at 1156.

"Where statutes are ambiguous or in conflict with one another, it is proper to resort to the rules of statutory construction." *Miss. Gaming Comm'n v. Imperial Palace of Miss., Inc.*, 751 So.2d 1025, 1028 (Miss. 1999). Parker believes subsections (1) and (5) are in conflict if, as it seems, the first provision prohibits certain conduct and the second provides that a violator is not liable for damages in a civil action. This is plainly wrong. Subsection (5) does not nullify or conflict with subsection (1). It merely precludes plaintiffs from

seeking a specific remedy—damages in a civil action. Parker's choice to pursue the one remedy subsection (5) denies does not bespeak conflict.[1]

Next, Parker asks we correct the Mississippi legislature's purported "obvious" error by adding the phrase "other than for a violation of subsection (1) of this section" to the end of subsection (5). If there is an error here, it is not obvious. This case is not like *Roseberry v. Norsworthy*, a case cited by Parker in which the Mississippi Supreme Court concluded with "irresistible conviction" that the legislature committed a "mere clerical error" by using the word "maximum" when it meant "minimum." *See* 100 So. 514, 517 (Miss. 1924). Nor is this case like *Martin v. State*, where the Mississippi legislature committed another clerical error—using the word "and" where it intended to use the word "are." *See* 199 So. 98, 101 (Miss. 1940.) We cannot very well add eleven words to the statute and claim to be correcting a clerical error. Absent undeniable evidence of error, such a course would be especially inappropriate given that we are a federal court applying state law in a diversity action. The legislature may rewrite the law, we will not.

Parker's final argument dispenses with statutory interpretation altogether. In *McArn v. Allied Bruce-Terminix Co., Inc.*, the Mississippi Supreme Court identified two "narrow" exceptions to the at-will employment doctrine: (1) where the employee is discharged for refusing to participate in illegal acts, and (2) where the employee "is discharged for reporting illegal acts." 626 So.2d 603, 607 (Miss. 1993). Only to that "limited extent" have Mississippi courts created "public policy exceptions to the age old common law rule of employment at will." *Id.* Per Parker, we "should adopt a third public

[1] As an alternative basis for affirmance, Leaf River argues section 45-9-55 does not provide a private right of action. We do not reach this argument, but the existence of the issue illustrates the lack of conflict here. Not every statutory violation gives rise to a private lawsuit, or to a claim for damages.

policy exception to the at-will employment doctrine." In other words, notwithstanding subsection (5) and Mississippi's robust at-will employment doctrine, we should create a cause of action that permits Parker's suit to go forward. The common law is not a means to end-run legislative enactments, and we will not effectively abrogate subsection (5) by judicial fiat.

AFFIRMED.

No. 15-60034

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOSEPH EDWARD PARKER,
Plaintiff-Appellant

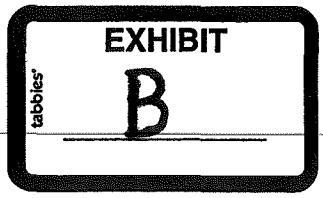
VERSUS

LEAF RIVER CELLULOSE, L.L.C.,
Defendant-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, EASTERN DIVISION

BRIEF OF DEFENDANT-APPELLEE

W. Thomas Siler, Jr., M.B. No. 6791
G. Todd Butler, M.B. No. 102907
PHELPS DUNBAR LLP
4270 I-55 North
Jackson, Mississippi 39211-6391
Telephone: 601-352-2300
Facsimile: 601-360-9777
Email: silert@phelps.com
todd.butler@phelps.com



CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case:

1. Joseph Edward Parker, Plaintiff-Appellant;
2. M. Reed Martz, Counsel for Plaintiff-Appellant;
3. Leaf River Cellulose, LLC, Defendant-Appellee; and
4. W. Thomas Siler, Jr. and G. Todd Butler, Counsel for Defendant-Appellee

SO CERTIFIED, this the 18th day of May, 2015.

/s/ G. Todd Butler
G. Todd Butler

STATEMENT REGARDING ORAL ARGUMENT

Appellant Joseph Edward Parker has expressly waived oral argument; Appellee Leaf River Cellulose, LLC submits only that oral argument is unnecessary. "[T]he facts and legal arguments are adequately presented in the briefs and record," such that Leaf River believes "the decisional process would not be significantly aided by oral argument." *See* F.R.A.P. 34(a)(2)(C). If any questions remain after reviewing the record and briefs in this case, Leaf River welcomes the opportunity to answer them orally.

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STATEMENT OF JURISDICTION

The district court had original jurisdiction under 28 U.S.C. §1332, and this Court has appellate jurisdiction under 28 U.S.C. §1291. Parker's notice of appeal was timely under Rule 4 because it was filed within 30 days of the district court's entry of judgment. *Compare* ROA.89 *with* F.R.A.P. 4(a)(1)(A) ("[T]he notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.").

STATEMENT OF THE ISSUES

1. Did the district court correctly conclude that the immunity provision of Mississippi Code § 45-9-55(5) barred Parker's lawsuit for monetary damages against Leaf River?

2. Even if the immunity provision of Mississippi Code § 45-9-55(5) is inapplicable, does the statute confer a private cause of action upon Parker?

3. Did the district court correctly reject Parker's invitation to carve out a new judicial exception to the at-will employment doctrine for violations of Mississippi Code § 45-9-55?

STATEMENT OF THE CASE

Parker filed this employment action for monetary damages against Leaf River in January 2014, alleging that he was terminated after a handgun was found in his vehicle on company premises during work hours. ROA.5-10. Leaf River moved for dismissal under Federal Rule of Civil Procedure 12(b)(6) on two

grounds: (1) Mississippi Code § 45-9-55(5)'s immunity provision bars Parker's lawsuit for monetary damages, and, (2) even if the immunity provision does not apply, Mississippi Code § 45-9-55 includes no private right of action for monetary damages. ROA.22-31. The district court granted Leaf River's request for dismissal on December 19, 2014, and Parker timely appealed on January 14, 2015. ROA.77-87; ROA.89-90.

STATEMENT OF THE FACTS

The facts alleged in Parker's complaint are straightforward. He contends that he was employed at Leaf River in New Augusta, Mississippi from October 2008 until he was terminated in December 2013. ROA.5-6. He further contends that the termination came after a handgun was discovered in his personal vehicle in an employee designated parking area. ROA.6.

According to Parker, his termination was in violation of state law. ROA.6. He maintains in particular that Mississippi Code § 45-9-55 authorized him keeping a handgun in his vehicle on Leaf River's premises. ROA.6-7. The lawsuit sought compensatory damages "[a]s a result of his termination" and as a result of Leaf River's alleged "improper conduct[.]" ROA.9.

SUMMARY OF THE ARGUMENT

Parker presents two alternative theories: He submits that Mississippi Code § 45-9-55 permits lawsuits for money damages or, if it does not, that this Court

should carve out a new public policy exception to Mississippi's at-will-employment doctrine and authorize lawsuits for money damages. Neither theory comports with well settled law.

Mississippi Code § 45-9-55, by its very text, provides that aggrieved persons may not sue for money damages. Subsection (5) of the statute plainly states that a "private employer shall not be liable in a civil action for damages resulting from or arising out of an occurrence involving the transportation, storage, possession or use of a firearm[.]" This does not mean that declaratory and injunctive relief is not available; it simply means that the legislature decided not to make employers liable for money damages. The district court correctly rejected Parker's request that the immunity provision be disregarded.

What's more is that, even aside from subsection (5)'s immunity provision, no private right of action is included in Mississippi Code § 45-9-55. Nothing in the statutory language mentions the possibility of civil liability and, in fact, subsection (5)'s immunity provision expressly rejects civil liability. Mississippi's legislature has demonstrated through other statutes how to create a private right of action, but one was not included in Mississippi Code § 45-9-55. Tellingly, Mississippi Code § 45-9-55 includes no provisions about damages, caps, or the like.

There certainly is no basis for carving out a never-before-recognized exception to Mississippi's at-will-employment doctrine. In 1993, the Mississippi Supreme Court recognized two "public policy" scenarios in which an employee could sue for wrongful discharge: when an employee is terminated for reporting criminally illegal conduct and when an employee is terminated for refusing to engage in criminally illegal conduct. Since then, both federal and state courts have repeatedly refused to expand the "public policy" scenarios any further, and, in fact, have narrowed the just-recited scenarios significantly. It is ill-advised for Parker to request that this Court create a third scenario, via an *Erie* guess, in the face of an express immunity provision to the contrary.

ARGUMENT

There is more than one path to affirmance. The most straightforward is to apply section (5)'s immunity provision and reject Parker's request to judicially expand Mississippi's at-will-employment doctrine. Even if the immunity provision did not apply, however, Parker would not have a plausible claim because Mississippi Code § 45-9-55 does not provide a private right of action for monetary suits. Each ground is discussed in turn.

I. The district court correctly held that Leaf River is immune from Parker's suit for monetary damages.

This appeal centers on Mississippi Code § 45-9-55, which provides in subsection (1) that Mississippi employers may not enforce policies that have "the

effect of prohibiting a person from transporting or storing a firearm in a locked vehicle in any parking lot, parking garage, or other designated parking area." The district court held that Parker's termination lawsuit requesting monetary damages was barred by the immunity provision of subsection (5), which provides that "[a] public or private employer shall not be liable in a civil action for damages resulting from or arising out of an occurrence involving the transportation, storage, possession or use of a firearm covered by this section."

When, as here, a federal court sits in diversity and is asked to determine the meaning of a state statute, the state court interpretive method controls. *See Keenan v. Donaldson, Lufkin & Jenrette, Inc.*, 529 F.3d 569, 572–73 (5th Cir. 2008). In Mississippi, the initial task is "to determine whether interpretation is necessary, that is, whether the language [of the statute] is plain, unambiguous, and in need of no interpretation." *See Pat Harrison Waterway Dist. v. County of Lamar*, 2015 WL 1249679, *10 (Miss. Mar. 19, 2015). If the statutory text is plain and unambiguous, then a court should "go no further." *Id.*

Subsection (5)'s immunity provision shields employers from monetary suits "resulting from or arising out of an occurrence involving the transportation, storage, possession or use of a firearm[.]" Legions of cases have "held that the phrase 'arising out of' is not ambiguous[.]" *E.g., Gen. Star Indem. Co. v. Driven*

Sports, Inc., 2015 WL 307017, *19 n.6 (E.D. N.Y. Jan. 23, 2015).[1] In Mississippi, the phrase "arising out of" is synonymous with "causal connection." *See, e.g., Singley v. Smith*, 844 So.2d 448, 453 (Miss. 2003). Given the lack of ambiguity for what "arising out of" means, this Court should "go no further" and simply apply the plain language of subsection (5). *See Pat Harrison*, 2015 WL 1249679 at *10.

It cannot seriously be argued that Parker's alleged injury – his termination – has no "causal connection" with "the transportation, storage, possession or use of a firearm[.]" *See* Miss. Code § 45-9-55(5). Indeed, Parker's complaint expressly contends that he was terminated after Leaf River searched his vehicle and "confirmed the presence of a handgun[.]" ROA.6. Subsection (5)'s immunity provision bars Parker's lawsuit because the termination arose out of "the transportation, storage, [and] possession" of the handgun. *See* Miss. Code § 45-9-55(5). The district court correctly characterized Parker's argument to the contrary as "nonsense." ROA.83.

Parker essentially concedes in his opening brief that the plain language of subsection (5) immunizes Leaf River. At page 15, he states that "Sub-section (5),

[1] *Accord Salcedo v. Evanston Ins. Co.*, 797 F.Supp.2d 760, 767 (W.D. Tex. 2011) ("But the term 'arising out of' in the Policy is not ambiguous."); *Hiscox Dedicated Corporate Member Ltd. v. Partners Commercial Realty, L.P.*, 2009 WL 1794997, *8 (S.D. Tex. June 23, 2009) ("Other courts have concluded that these same phrases, 'arising out of' and 'based upon,' are not ambiguous[.]"); *Lincoln Gen. Ins. Co. v. Aisha's Learning Ctr.*, 2005 WL 954997, *3 (N.D. Tex. April 26, 2005) (collecting cases that hold the phrase "arising out" is not ambiguous).

read alone, appears to be a blanket statement behind which employers can hide from any damages that arise from violating § 45-9-55(1) – (4)." This concession is dispositive, for the analysis "must begin and end with the plain language of the statute." *See Estate of McCullough v. Yates*, 32 So.3d 403, 416 (Miss. 2010) (Dickinson, P.J. concurring).

Any attempt to overcome subsection (5)'s immunity provision with the "whole-act rule" is unavailing. As an initial matter, Parker did not make the argument in the district court, and "an argument not raised before the district court cannot be asserted for the first time on appeal." *See Sullo & Bobbitt, P.L.L.C. v. Milner*, 765 F.3d 388, 393 (5th Cir. 2014) (internal quotation marks and citation omitted). Moreover, because the statute is plain and unambiguous, use of the whole-act rule is prohibited. *See Pat Harrison*, 2015 WL 1249679 at *10 (explaining that, when a statute is plain and unambiguous, courts should "go no further").[2]

Nonetheless, the whole-act rule actually supports Leaf River's position in this case. Under the whole-act rule, "one section of an enactment is analyzed in light of the whole" enactment. *See Marlow*, 686 F.3d at 309. Nothing about subsection (5) conflicts with other provisions of Mississippi Code § 45-9-55.

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[2] In *Marlow, L.L.C. v. BellSouth Telecommunications, Inc.*, 686 F.3d 303, 309 (5th Cir. 2012), Judge Southwick expressly acknowledged that the whole-act rule may be "one of the canons that cannot be used until first finding ambiguity."

Significantly, subsection (5) bars only "civil actions for damages." It says nothing about private injunctive relief, declaratory relief, enforcement actions by state agencies, or any other potential remedy. It is not uncommon for a legislature to preclude a particular type of remedy. Georgia, for example, has expressly limited enforcement of its "gun to work" law to actions filed by the Attorney General. *See* Ga. Code § 16-11-135(e).

The bottom line is that Parker wants the one thing that the Mississippi statute says he cannot have: civil damages. Precluding this particular remedy is not "madness," as Parker argued in the district court. ROA.42. It is instead a policy decision by the legislature with which he disagrees. The district court rightly adopted Leaf River's position on this point. ROA.84.

In a similar vein, because the plain language of the statue is clear and unambiguous, there is no occasion to consider legislative history. *See Pat Harrison*, 2015 WL 1249679 at *10 (explaining that, when a statute is plain and unambiguous, courts should "go no further"). Even if resorting to legislative history was proper, however, there is no such history supporting Parker's narrow interpretation of the immunity provision.

Parker maintains that Section 45-9-55 was passed against a "backdrop" of workplace violence, but the argument is not supported by useable evidence. He refers to a workplace shooting at a Lockheed Martin facility, which occurred three

years before the passage of the statute in 2006, and then cites to the "2006 Legislative Session At-a-Glace Highlights." Nothing, however, is offered linking the Lockheed Martin incident to passage of Mississippi Code § 45-9-55, and Parker most certainly may not rely on "legislative highlights" that are nothing more than an incomplete (and in this case inaccurate) synopsis of enacted bills from the 2006 session that may be found by searching the Internet. *See* House Information office Website, http://www.peer.state.ms.us/HiLites0407term.html.

More importantly, though, even if such a connection between the statute and Lockheed Martin existed, Parker does not explain why the filing of "many lawsuits" against Lockheed would mean that legislators intended Section 45-9-55(5) to be less protective of employers. No one disputes that the legislature intended to protect employers from lawsuits when employees use guns to commit workplace violence. But the law it actually passed went further, expressly barring liability "resulting from or arising out of an occurrence involving the transportation, storage, possession or use of a firearm." *See* Miss. Code § 45-9-55(5). The possibility that some legislators were particularly concerned about one type of liability in no way justifies ignoring the textual protection against other types.

Plus, if the purpose of the liability exemption of subsection (5) was merely to insulate employers against lawsuits for workplace shootings, it would make no

sense to refer broadly to damages "arising out of an occurrence involving the transportation, storage, possession or use of a firearm." The phrase "use of a firearm" – or at most "discharge of a firearm" – would do all the necessary work. Instead, the legislature included the words "transportation, storage, [and] possession," then expanded protection to "occurrences involving" the same, then expanded protection still further to damages "resulting from or arising out of" such occurrences. *See* Miss. Code § 45-9-55. It would be difficult to draft language conferring a broader penumbra of protection to employers.

The fact that the Mississippi statute is part of a national trend of passing so-called "gun-to-work" laws only undercuts Parker's argument. Other states have drafted liability exemptions that are far different from Mississippi's version. The gun-to-work laws in other states emphatically show that lawmakers are fully capable of drafting statutes that say precisely what they intend with respect to limiting liability.

Florida's statute, for example, provides that an "employer is not liable in a civil action based on actions or inactions taken in compliance with this section" and further states that immunity does not extend to "actions or inactions of public or private employers that are unrelated to compliance with this section." *See* Fla. Stat. § 790.251(5)(b). And unlike the Mississippi statute, Florida's law expressly

provides a private right of action and specifies the remedies available in such an action. *Id.* at § 790.251(6).

Georgia's gun-to-work statute expressly limits liability to those situations in which the employer "commits a criminal act involving the use of a firearm" or knew that another person would commit such an act. *See* Ga. Code § 16-11-135(e). In contrast to Florida's statute, however, Georgia's law provides that "all enforcement actions" must be brought "exclusively by the Attorney General." *Id.* at § 16-11-135(i).

It is clear that Mississippi chose to draft a liability exemption similar to – but broader than – exemptions in other states. Thus, this Court should interpret Section 45-9-55 according to its text, not according to alleged subjective intentions that drafters might have, but did not, write into the law. The little legislative history that exists confirms that the legislature did not draft the employer liability exemption of subsection (5) haphazardly. The initial bill was amended once to add the exemption and then amended again to expand the exemption by adding the phrase "use of a firearm." This Court should uphold the immunity that the legislature provided and affirm the district court's decision.

II. In the alternative, even if Leaf River was not entitled to immunity, Mississippi Code 45-9-55 includes no private right of action for money damages.

Even if Mississippi Code § 45-9-55 did not expressly bar claims for damages, there is no basis for inferring a private right of action. In Mississippi, the rule is that "a mere violation of a statute or regulation will not support a claim where no private cause of action exists." *Tunica County v. Gray*, 13 So.3d 826, 829 (Miss. 2009). Absent express statutory language, the party claiming the right of action "must establish a legislative intent, express or implied, to impose liability for violations of that statute." *Doe v. State ex rel. Miss. Dep't of Corrections*, 859 So.2d 350, 355 (Miss. 2003). This Court may "affirm on any ground supported by the record, including one not reached by the district court." *Ballew v. Cont'l Airlines, Inc.*, 668 F.3d 777, 781 (5th Cir. 2012).

There is no evidence that the legislature intended to create a private cause of action against employers for violations of Mississippi Code § 45-9-55. To the contrary, subsection (5) plainly reflects an intent to shield employers from liability. For decades, the Mississippi Code has contained other provisions barring restrictions on firearm use and possession. *E.g.*, Miss. Code § 45-9-51 (prohibiting municipal ordinances affecting firearm possession); Miss. Code § 45-9-57 (prohibiting counties from restricting firearm discharge on private land). None

contain language implying a private cause of action, and there is no record of any private lawsuit based on these statutes.

That said, the legislature is fully aware of how to draft a statute authorizing private claims against employers when that is the intent. *See, e.g.*, Miss. Code § 25-9-175 (establishing private cause of action for whistleblowers against public employers). The absence of any similar language here means no private right of action should be inferred. Significantly, there are no provisions about damages, caps, or the like in Mississippi Code § 45-9-55.

Parker's argument, in a nutshell, is that this Court should create a monetary remedy for Mississippi Code § 45-9-55 because he believes that the statute would otherwise amount to a right without a remedy. That belief is wrong, though, because it has already been explained that the statute does not forbid all potential remedies. In any event, the position is essentially code word for "purposive statutory interpretation." This Court is obligated to reject that interpretive method and do what Mississippi's courts would do: follow the plain language of the statute. *See King Metal Bldgs., Inc. v. Renasant Ins. Inc.*, 159 So.3d 567, 573 (Miss. Ct. App. 2014) ("We further acknowledge that we apply the plain language and plain meaning of statutes.").

Our nation's highest court, like Mississippi's highest court, has flatly rejected the purposive approach to statutory interpretation. One example is

Correctional Servs. Corp. v. Malesko, 534 U.S. 61, 75, 122 S.Ct. 515, 524 (2001) (Scalia, J., concurring), where Justice Scalia colorfully characterized purposive interpretation as "the heady days in which this Court assumed common-law powers to create causes of action." It was explained in *Malesko* that the Supreme Court has "abandoned th[e] power to invent 'implications' in the statutory field[.]" *Id.* This Court likewise should not entertain the purposive approach, should apply the plain language of Mississippi Code § 45-9-55, and should affirm the district court's decision.

III. The district court correctly refused to expand the "public policy" exception to Mississippi's at-will-employment doctrine.

Since 1858, Mississippi has followed the at-will employment doctrine, which provides that an employee may quit or be terminated for good or bad reason or for no reason at all. *See Butler v. Smith & Thorpe*, 35 Miss. 457, 464 (1858). The only exceptions to the at-will doctrine are the "very narrow" public policy exceptions carved out in *McArn v. Allied Bruce-Terminix Co., Inc.*, 626 So.2d 603 (Miss. 1993) for reporting, or refusing to engage in, criminally illegal conduct. Commentators have acknowledged that, "[d]espite both judicial and legislative developments in national labor laws[,]" Mississippi has remained steadfast in its adherence to the at-will doctrine. *See* Bryan C. Sawyers, *The Inconvenient Worker -- Can Mississippi's Public Policy Exceptions To The Employment-At-Will*

Doctrine Be Expanded To Encompass The Exercise Of Workers' Compensation Rights?, 81 MISS. L.J. 1563, 1567 (2012).

Parker's request that a third public policy exception be recognized is especially bold. Significantly, he does not seek to recognize a right where Mississippi law is merely silent like the plaintiff in *McArn*. Instead, he seeks to override the legislature's expressly stated bar to civil damages in subsection (5) of Mississippi Code § 45-9-55. This is something no Mississippi court has ever accepted.

Again, the public policy-based claims recognized in *McArn* are merely "judicially created" exceptions to the rule that employment is terminable at will. *See Laws v. Aetna Finance Co.*, 667 F.Supp. 342, 345 (N.D. Miss. 1987). Mississippi courts strongly disfavor the creation of new judicial exceptions to that rule. *See, e.g., Miranda v. Wesley Health System, LLC*, 949 So.2d 63, 69 (Miss. Ct. App. 2006). This strong reluctance becomes a flat refusal when, as here, courts are asked to "engraft[] an exception onto any existing statutory law." *See Laws*, 667 F. Supp. at 345. Where the legislature has enacted a statutory scheme with no private claim for wrongful termination, the Mississippi Supreme Court has, without fail, refused to create one. *See, e.g., Buchanan v. Ameristar Casino Vicksburg, Inc.*, 852 So.2d 25, 26 (Miss. 2003) (no implied cause of action for

termination in retaliation for seeking worker's compensation) (citing *Kelly v. Mississippi Valley Gas Co.*, 397 So.2d 874 (Miss. 1981)).

In this particular case, the barrier to a policy-based cause of action is higher still. In *Buchanan*, the Supreme Court refused an invitation to create a private cause of action because the legislature had enacted a workers' compensation statute that was silent on the issue of civil liability. *See* 852 So.2d at 26. By contrast, the legislature was not silent in Mississippi Code § 45-9-55 and instead affirmatively foreclosed the possibility of civil damages through subsection (5).

Given subsection (5)'s clear textual bar to liability, a "public policy" exception is not an option. *See, e.g., Boutwell v. Time Ins. Co.*, 2013 WL 53902, *5 (S.D. Miss. Jan. 3, 2013) (citing *Stanley ex rel. Estate of Hale v. Trinchard*, 579 F.3d 515, 518 n. 6 (5th Cir. 2009)). Put another way, the expressly-stated public policy of the State of Mississippi is that civil damages are not available for alleged injuries arising out of the transportation or storage of guns on employer property.

This Court has refused other requests to expand Mississippi's public policy exceptions. In *Howell v. Operations Management International, Inc.*, 77 Fed.Appx. 248, 251-52 (5th Cir. 2003), for example, the plaintiff sought to bring a wrongful termination claim for reporting his employer's alleged violations of OSHA. The claim was rejected, with an explanation that Mississippi courts had

allowed wrongful discharge claims only when a plaintiff reported conduct that was criminally – as opposed to civilly – punishable. *Id.*

Two things are particularly significant about *Howell*. First, this Court affirmatively stated that it would not "widen the 'narrow public policy exception' described in *McArn*[.]" *Id.* at 252. Accepting Parker's invitation here would contradict that statement. Second, this Court stated that the plaintiff's expansion attempt was "especially inappropriate given that OSHA can take action against employers who terminate employees in retaliation for filing safety complaints." *Id.* There likewise are other enforcement avenues with respect to Mississippi Code § 45-9-55 that have not been utilized here.

The only Mississippi court to pass judgment on Mississippi Code § 45-9-55 declined to expand the public policy exceptions carved out in *McArn*. In *Swindol v. Aurora Flight Scis. Corp.*, 2014 WL 4914089, *3 (N.D. Miss. Sept. 30, 2014), the court collected countless federal and state cases where courts refused "to expand the exceptions carved out by *McArn* or to recognize any additional public policy exceptions." *Swindoll* currently is on appeal before this Court as Case Number 14-60779.

In sum, Parker's argument for expanding state law is even weaker than his flawed interpretation of Mississippi Code § 45-9-55. When reviewing state law claims, this Court's task "is to attempt to predict state law, not to create or modify

it." *See Keen v. Miller Environmental Group, Inc.*, 702 F.3d 239, 243 (5th Cir. 2012). The district court's application of this principle should be affirmed.

CONCLUSION

For all of the reasons set forth, Leaf River asks that this Court affirm the district court's judgment.

This, the 18th day of May, 2015.

Respectfully submitted,

BY: */s/ G. Todd Butler*
W. Thomas Siler, Jr., M.B. No. 6791
G. Todd Butler, M.B. No. 102907
PHELPS DUNBAR LLP
4270 I-55 North
Jackson, Mississippi 39211-6391
Telephone: 601-352-2300
Facsimile: 601-360-9777
Email: silert@phelps.com
todd.butler@phelps.com

ATTORNEYS FOR APPELLEE

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Respectfully submitted,

BY: */s/ G. Todd Butler*
G. Todd Butler

Dated: May 18, 2015.

CERTIFICATE OF SERVICE

I, G. Todd Butler, do hereby certify that I electronically filed the foregoing with the Clerk of the Court, using the CM/ECF system, which sent notification of such filing to the following counsel of record:

M. Reed Martz
Freeland Martz, PLLC
P.O. Box 2249
Oxford, MS 38655
reed@freelandmartz.com

ATTORNEY FOR PLAINTIFF-APPELLANT

This, the 18th day of May, 2015.

/s/ G. Todd Butler
G. Todd Butler